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State v. Ballard Appellant's Reply Brief Dckt. 39242

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39242
)	
v.)	
)	
WESTON LLOYD BALLARD,)	REPLY BRIEF
)	
Defendant-Appellant.)	

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM

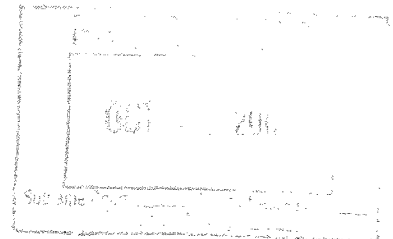
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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Ballard argued, *inter alia*, that the Idaho Supreme Court denied him due process and equal protection when it denied his Motion to Augment the record with transcripts from his original sentencing hearing, rider review hearing, and first probation violation hearing. Mr. Ballard also argued that the district court abused its discretion when it revoked his probation, and executed his underlying sentence without *sua sponte* reducing it.

In its Respondent's Brief, the State argues that, should this case be assigned to the Idaho Court of Appeals, it would lack the authority to review the Idaho Supreme Court's decision. (Respondent's Brief, pp.7-9.) The State also argues that Mr. Ballard failed to demonstrate that the Idaho Supreme Court's order denying his motion to augment violated his constitutional rights because "there is no evidence that the district court had such transcripts when it revoked Ballard's probation in August 2011, or that it relied upon anything said at the previous hearings as a basis for its decision to finally revoke Ballard's probation and order his sentence executed." (Respondent's Brief, pp.10-11.) Finally, the State argues that because "[t]here is nothing in the record that in any way indicates that the Idaho Supreme Court denied Ballard's request solely because he is indigent," his equal protection claim should be rejected. (Respondent's Brief, p.11.)

This brief is necessary to address the State's argument that Mr. Ballard's Motion to Augment was properly denied because there is no evidence that such transcripts were before the district court at the time of its decision. Mr. Ballard asserts that

because the district court can rely on its own memory of prior proceedings when it considers whether to *sua sponte* reduce an underlying sentence upon revoking probation, the information was known to the district court at the time it revoked his probation and declined to *sua sponte* reduce his underlying sentence. Furthermore, since Idaho appellate courts conduct an independent review of the record when determining whether a district court abused its discretion in sentencing decisions, what the district court actually considered is irrelevant. The only appropriate considerations are whether the information was before the district court and whether it is relevant to an issue on appeal. This brief is also necessary to rebut the State's argument concerning Mr. Ballard's equal protection claim. With respect to the remaining issue, whether the district court abused its discretion when it revoked Mr. Ballard's probation and executed the underlying sentence without *sua sponte* reducing it, Mr. Ballard will rely on the argument set forth in his Appellant's Brief.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Ballard's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

ISSUE

Did the Idaho Supreme Court deny Mr. Ballard due process and equal protection when it denied his motion to augment with the requested transcripts?

ARGUMENT

The Idaho Supreme Court Denied Mr. Ballard Due Process And Equal Protection When It Denied His Motion To Augment With The Requested Transcripts

A. Introduction

In Idaho, district courts may consider a broad range of information when making sentencing decisions. As a result, Idaho appellate courts have long required defendants to provide an extensive appellate record because appellate review includes an independent review of the entire record before the district court when determining whether an abuse of discretion has occurred. The question on appeal generally does not focus on how or what the district court actually considered; rather, it is whether the appellate record supports the district court's decision.

Since, in order to conduct this analysis, Idaho appellate courts need to have all relevant information that was before the district court, they will presume that any missing information supports the trial court's determination and, in such cases, refuse to rule on the merits of the issue. In some instances, appeals have been dismissed due to an appellant's failure to provide transcripts of hearings which occurred years before the disposition of the issue on appeal.

In this case, Mr. Ballard argues that the Idaho Supreme Court denied him due process and equal protection when it denied his request for preparation of transcripts necessary to provide an adequate record for appeal. In response, the State argues that the requested transcripts are not necessary because the district court could not have considered the transcripts when it made the decision to revoke Mr. Ballard's probation and declined to *sua sponte* reduce his underlying sentence. The State's position, if taken to its logical conclusion, would limit the information a district court could consider

because a transcript of a prior hearing would have to be created before a district court could consider information from that prior hearing in a subsequent proceeding. Under the State's logic, without a transcript of a defendant's original sentencing hearing, a district court could not consider information from that sentencing hearing when determining whether to grant or deny an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion.

B. The Idaho Supreme Court Denied Mr. Ballard Due Process And Equal Protection When It Denied His Motion To Augment With The Requested Transcripts

The Idaho Supreme Court denied Mr. Ballard's requests for transcripts of three hearings held prior to the revocation of his probation and execution of his underlying sentence without reduction.¹ That denial prevents Mr. Ballard from adequately addressing the issue raised on appeal. Furthermore, under Idaho case law, it must be presumed that the information contained in the missing transcripts supports the district court's decisions to revoke probation and execute the underlying sentence without *sua sponte* reducing it.

In response to this argument, the State argues that the requested transcripts are not relevant on appeal because "there is no evidence that the district court had such transcripts when it revoked Ballard's probation in August 2011, or that it relied upon anything said at the previous hearings as a basis for its decision to finally revoke

¹ The State correctly points out, with respect to a portion of Mr. Ballard's brief, in which he argues that he is entitled to transcripts of a January 28, 2008, sentencing hearing, and a September 8, 2008, probation violation admission hearing, that no such hearings were held on those dates, and that Mr. Ballard's Motion to Augment did not include a request for those transcripts. (Respondent's Brief, p.10 n.3.) Mr. Ballard respectfully withdraws that portion of his argument concerning those non-existent hearings.

Ballard's probation and order his sentence executed." (Respondent's Brief, pp.10-11.)

Contrary to the State's position, the question of whether the requested *transcripts* were before the district court at the time of its decision is not relevant in deciding whether the transcripts are relevant on appeal because, in making such a decision, a district court is not limited to consideration of only that information offered at the proceeding from which the appeal is taken. Rather, a court is entitled to utilize knowledge gained from its own official position and observations. See *Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *State v. Sivak*, 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during the trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon "the number of certain types of criminal transactions that [he] has observed in the courts within his judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected to disregard what he already knew about Gibson from the other case"). Thus, whether the prior hearings were transcribed at the time the district court revoked his probation and declined to *sua sponte* reduce his underlying sentence is irrelevant, because the district court *could have* relied upon the information it already knew from the prior hearings when it did so.

Additionally, the State's position is unworkable because all transcripts, except a transcript of the hearing from which the appeal is taken, would be considered new and irrelevant information. This is inconsistent with the Idaho Court of Appeals' holding in *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000), in which a transcript of the guilty

plea hearing was not provided by the defendant on appeal, leading the Court of Appeals to presume that something occurred in that hearing that supported the district court's sentencing decision. *Id.*

If the State's argument is taken to its logical conclusion, a transcript of a defendant's original sentencing hearing would be new information in instances where an appeal is filed from the denial of a Rule 35 motion. If that does constitute new and irrelevant information, then a district court should not, absent a transcript, consider what happened at sentencing when evaluating a Rule 35 motion. This result would be in conflict with the Idaho Court of Appeals' decision in *State v. Wright*, 114 Idaho 451, 452-453 (Ct. App. 1988), in which the Court of Appeals refused to address the merits of an appeal from the denial of a Rule 35 motion because the appellant failed to designate the Presentence Investigation Report (*hereinafter*, PSI) and a transcript of the sentencing hearing as part of the appellate record. *See also State v. Rundle*, 107 Idaho 936 (Ct. App. 1984).

The State's position is also undermined by *State v. Warren*, 123 Idaho 20 (Ct. App. 1992). Warren was convicted of aggravated battery and placed on probation, which was later revoked, with the district court retaining jurisdiction. *Id.* at 21. After the period of retained jurisdiction, Warren was again placed on probation, which was later revoked. Warren appealed, arguing that his sentence was excessive. *Id.* On appeal, Warren argued that his probation violation was trivial. The Court of Appeals addressed that argument stating "Warren incorrectly points to the nature of the probation violation by arguing that his violation was trivial. This Court must look at the nature of the original criminal offense, in this case aggravated battery where Warren bit off his victim's ear."

*Id.*² Ultimately, the Court of Appeals did not address the merits of Warren's sentencing claim because he had failed to provide the original PSI and a transcript of the original sentencing hearing. *Id.* Even though the district court's original sentence was not being appealed, and had occurred years before the decision at issue, the Court of Appeals held that the transcript was necessary to address Warren's claims of error. Moreover, there was no indication that the district court considered the original sentencing proceedings at the probation violation disposition hearing. It appears that the Court of Appeals assumed that the original sentencing hearing would address the nature of the original offense. In light of the Court of Appeals' holding in *Warren*, had Mr. Ballard failed to request the transcripts, the State could have argued that his appeal should have been rejected for failure to provide an adequate appellate record.³

Finally, the State argues, without citation to authority, "[t]here is nothing in the record that in any way indicates that the Idaho Supreme Court denied Ballard's request

² In reaching this conclusion, the Court of Appeals was conducting an independent review of the record.

³ The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, Docket No 39057, 2012 Opinion No. 38 (Ct. App. 2012), *rev. pending*, which addressed the foregoing argument. In *Morgan*, the Court of Appeals clarified the scope of review articulated in *State v. Hanington* 148 Idaho 26 (Ct. App. 2009). Specifically it held:

In reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation. However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

Morgan at 4 (emphasis in original). As the *Morgan* opinion is neither final nor an opinion of the Idaho Supreme Court, Mr. Ballard's arguments are still appropriately pursued on appeal.

solely because he is indigent.” (Respondent’s Brief, p.11.) Mr. Ballard asserts that the motivation of the Idaho Supreme Court in denying his Motion to Augment is irrelevant; rather, it is the effect that the denial had on him that matters. *See Burns v. Ohio*, 360 U.S. 252 (1959) (rejecting state law requiring that all appellants, regardless of financial status, pay a filing fee in order to obtain appellate review).

In sum, Idaho courts consider a very broad range of information when making sentencing decisions. Due to that broad range of discretion, an appellant must provide an extensive appellate record in order to challenge decisions concerning sentencing and probation revocation on appeal because Idaho appellate courts will presume that any missing information supports the district court’s decision. It generally does not matter what the district court actually considered, if the information was in the record and is relevant to an issue on appeal, an appellate court will review that information. In light of the foregoing, the Idaho Supreme Court denied Mr. Ballard due process and equal protection when it denied him transcripts of the hearings he will need to overcome this presumption.

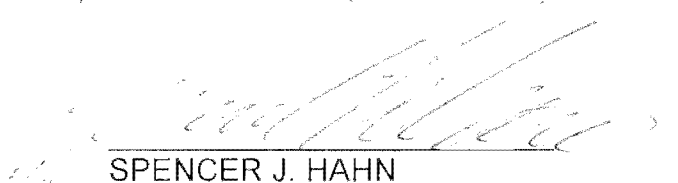
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CONCLUSION

For the reasons set forth herein, and in his Appellant's Brief, Mr. Ballard respectfully requests that this Court grant him access to the requested transcripts, and the opportunity to present supplemental briefing as to any issues arising as a result of a review of the transcripts. In the alternative, Mr. Ballard respectfully requests that this Court order that he be placed on probation or reduce his sentence as it deems appropriate.

DATED this 17th day of October, 2012.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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EVAN A. SMITH
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SJH/eas